House Committee on Criminal Justice
June 2, 2015
HB 4138 – Presumptive Parole

Testimony of Citizens Alliance on Prisons and Public Spending

The original problem: the statutory standard for parole is overly broad and subjective standard

MCL 791.33 says:

> A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety.

This very broad, subjective standard is actually a prohibition on release, not a directive on when release should occur. It gives the parole board total discretion to decide what constitutes "reasonable assurance."

Not surprisingly, although the standard has stayed the same, parole grant rates have fluctuated widely over the years as parole board membership has changed and the board's perception of its mandate has varied. Similar offenders serving the same minimum terms for similar offenses could end up serving very different amounts of time in prison, depending on when and how the parole decision was made.

The original solution: parole guidelines

The purpose of giving guidelines to any decisionmaker is to place some boundaries on how they exercise their discretion. Thus the sentencing guidelines were implemented to keep individual judges from being far harsher or more lenient than the norm.

- If a judge wants to give a sentence that is outside the recommended range, he or she must place "substantial and compelling reasons" for departing on the record.
- Those reasons are subject to appeal by either the defendant or the prosecutor. As a result, a body of law has evolved that defines what "substantial and compelling" means.

The legislature required the MDOC to develop parole guidelines in 1992, the same year that the parole board membership was changed from corrections professionals with civil service protection to appointees. Prisoners are scored on seven different variables, including their offense, prior record, institutional conduct, age and program performance. Depending on their scores, they are classified as high, average or low probability of release. Administrative Rule 791.7716 says that the guidelines shall ensure that prisoners who score in the high probability range do not exceed an assaultive felony recidivism rate of 5%.

MCL 791.233e says that the parole guidelines:

- "shall govern the exercise of the parole board's discretion" and

- their purpose "is to assist the parole board in making release decisions that enhance the public safety."

It also says: the parole board "may depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole… or by granting parole to a prisoner who has a low probability of parole... A departure …shall be for substantial and compelling reasons stated in writing."

Thus, there is a presumption built into section 233e that people who score high probability for release will be granted parole when they first become eligible unless there are substantial and compelling reasons that enhance public safety for not releasing them.

How parole guidelines have actually worked out

Although the "substantial and compelling" standard for departure is the same for both sentencing and parole guidelines, their practical application has been very different.

The ability of the parties to obtain judicial review created an enforcement mechanism for the sentencing guidelines. Judges who don't follow them are subject to having their decisions reversed.

The ability of prisoners to appeal parole board decisions was eliminated in 1998. While prosecutors and victims can appeal decisions to grant parole, prisoners who score high probability of release have no way to challenge the adequacy of the board's reasons for denying parole. Thus no body of law defines what the departure standard means in the parole context.

With no mechanism for enforcement, the parole board as a whole treats the guidelines as advisory. Individual members give them more or less credence in making recommendations about the prisoners they interview. The substantial and compelling reasons given to justify denying parole in high probability cases have devolved into a litany of subjective conclusions that the person lacks "empathy," "insight" or "remorse."

As of Feb. 2012, there were 1,550 prisoners who scored high probability who had nonetheless been denied parole.

- They were, on average, 2.6 years past their earliest release date.
- Recently the MDOC reported that there are currently about 1,900 people serving past their ERD despite having scored high probability on the parole guidelines.

The vast majority of these prisoners were convicted of homicide, sex or other assaultive offenses. Despite their low risk of reoffending, the parole board is effectively resentencing them to serve beyond their minimum sentences because of its own view of the offense.

There is no public safety justification for these denials. There is simply no evidence that keeping people past their ERD who are demonstrably at low risk for reoffending benefits the public in any way.

- Research summarized by the Pew Center for the States shows that there is no demonstrable connection between length of incarceration and the likelihood of reoffending.

- The Council of State Governments found virtually no difference in re-arrest rates among people released on their ERD and those who were continued for months or years later.

Continued incarceration to prevent future crime is only effective in those individual cases where there is reason to believe a particular person is likely to reoffend. Excessive incarceration to promote a false sense of security is wasteful. Over the 20+ years the guidelines have been in effect, thousands of low risk prisoners have served what must be tens of thousands of additional years at great personal expense to them and their families and at great fiscal cost to taxpayers.

An effective solution: Presumptive parole

CAPPS has long advocated for implementing the legislative intent by replacing the subjective "substantial and compelling standard" with an express presumption of parole on the ERD for high probability prisoners. Limited exceptions would be clearly specified.

The Council of State Governments also supports this approach. It recommended the following standard:

> *The parole board shall release a prisoner who scores high probability of release on the parole guidelines upon service of the prisoner's minimum sentence, unless 1 of the following circumstances if present:*
>
> *(A) The prisoner has an institutional misconduct score lower than -1*
> *(B) There is objective and verifiable evidence of post-sentencing conduct not already scored in the parole guidelines that demonstrates that the prisoner would present a high current risk to public safety if released.*
> *(C) The prisoner has a pending felony charge or detainer, or*
> *(D) Release would otherwise be barred by law.*

The MDOC has estimated that adoption of this standard could save 3,200 beds within five years. That's the equivalent of two full prisons and four additional housing units at a savings of over $75 million.

Benefits of presumptive parole

Besides reducing the prisoner population and saving money, presumptive parole would:

1. Require the board to give more deference to the minimum sentence imposed by a judge pursuant to sentencing guidelines enacted by the legislature. Minimums that are the product of plea negotiations would also be more effectively implemented.

2. Increase transparency and certainty for victims and prisoners. Michigan's "truth in sentencing" statute requires people to serve every day of the minimum, without reductions for good behavior. Presumptive parole would then ensure release when the minimum has been served, barring good cause for parole denial.

3. Preserve the board's discretion to deny release when the evidence indicates the person is currently a risk to the public. It is a middle ground between our current scheme of indeterminate sentencing that gives the parole board wholly unfettered discretion and

determinate or "flat" sentencing schemes that require release when the term has been served and leave no room for parole board discretion.

4. Rely on evidence-based practices. Research shows that release decisions based on validated risk assessment instruments are more accurate than those based on the subjective judgments of individual parole board members.

5. Depoliticize the parole process. An affirmative statutory mandate with objective criteria would help insulate the board from public pressure and promote consistency.

It would not:

- Require the board to release anyone where there was verifiable evidence that they pose a current risk.
- Change the victims' role in the process or their ability to communicate with the parole board.

The legislative history

The CSG language was embodied in HB 5931, as it was introduced by Rep. Haveman last November. Unfortunately, numerous amendments to the bill undercut its purpose so badly we could no longer support it.

In particular, the version that passed that passed the House incorporated the concept of substantial and compelling reasons for departure that would "include, but not be limited to," the listed circumstances. Obviously, once the listed circumstances become mere examples, not limitations on what the board can assert as reasons for departure, we're right back where we started. The board can deny parole to high probability prisoners for any reason it chooses.

That version of the bill also added as a reason for not applying the presumption:

> (B) There is objective evidence of harm to a victim that was not available for consideration at the time of sentencing, or that the prisoner has threatened to harm another person if released.

The first portion of this provision is highly problematic. What does "not available" mean? How is the board to determine whether the sentencing court knew or could have known the information? Is the board supposed to hold an evidentiary hearing and call witnesses? What if the information could have been available for the court's consideration but the victim, for whatever reason, chose not to provide it? Does it matter whether having the information would even have affected the court's judgment? There is no quantum of harm identified, so the information need not even be significant. There is not even a process for ensuring that this newly identified harm was actually caused by the prisoner.

The bill that passed the House ultimately died in lame duck. However Rep Heise picked up the torch and introduced HB 4138. The original version of 4138 tracked the original version of 5931, with the standard for presumptive parole that CSG originally recommended. However, the substitute before you now is based on the version of 5931 that passed the House. It contains the provision that substantial and compelling reasons for departure "include but are not limited to"

the listed circumstances. It also contains the provision about harm that was "unavailable for consideration at the time of sentencing."

So here we are, once again, asking that you not pass a bill called "presumptive parole" that does not actually solve the problem. Legislation that purports to create change but effectively preserves the status quo is worse than no legislation at all. It creates the appearance that the problem has been addressed and forestalls future attempts at a real cure.

There are two other aspects of this legislation we would ask you to consider.

Retroactivity

The bill before you would apply only to people sentenced after its effective date. We urge you to give the presumption of parole to current prisoners who score high probability on the guidelines as they come up for consideration. We're not suggesting that all 1,900 people with high probability scores who are currently past their ERD should be reconsidered immediately. But they have each been continued for 12, 18 or 24 months and, if they still score high probability, they should get the benefit of the presumption the next time they are reviewed.

- There is no retroactivity problem: the board would merely be implementing the minimum sentence imposed by the court once the prisoner has become eligible for release, as it already does in thousands of cases every year.
- Applying presumptive parole prospectively would not yield a significant increase in releases for several years. Applying it to current prisoners would save tens of millions of dollars a year much sooner.
- Current prisoners are already entitled to the presumption intended by 233e. It is only fair to give them the benefit of a statutory change that is simply designed to ensure that presumption is implemented.
- Prosecutors should not need time to change their advice to victims.
    - Prosecutors know that the board has the authority to release any prisoner who has served the minimum. They have no basis for telling the victim in any particular case that the board will do otherwise.
    - It is the antithesis of truth in sentencing for prosecutors to negotiate guilty pleas with defendants in exchange for specific minimum sentences while assuring victims that the board would never actually implement those sentences.
    - Prosecutors can appeal grants of parole if they believe the presumption has been applied improperly in particular cases.

Enforcement

Since the problem that needs to be fixed stems from the lack of any means for enforcing Sec. 233e as currently written, it is apparent that a method of enforcing the presumption of parole would be needed. This could be the restoration of appeals of parole denials by prisoners who score high or average probability and/or a system of reporting parole denials to the Legislature and the Criminal Justice Policy Commission.

The Attorney General's office opposes restoring the right of prisoners to appeal parole denials because it believes that the volume of appeals would create an undue burden to respond. We submit this concern is overstated.

The parole board would have a great deal of control over how many appeals get filed.

- If presumptive parole is implemented as envisioned, there will be far fewer prisoners denied parole and the pool of potential appeals will be much smaller than it was in 1998.
- The majority of prisoners did not appeal parole denials when they could in the past. They would have even less incentive to appeal in the future if they are given objective, verifiable reasons that meet the statutory standard and if they are assured of annual reconsideration.
- As a body of case law is developed for both the board and prisoners to follow, the volume of appeals will decline.

Responding to a prisoner's appeal is far less costly than keeping that person incarcerated unnecessarily.

- Oversight mechanisms are the price of ensuring that any government decision-making process works properly.
- We allow people to appeal everything from a denial of public benefits to a driver's license suspension to a 90-day jail stay. Parole denials are highly consequential decisions that take years from people's lives, cost hundreds of millions of tax dollars and effectively set criminal justice policy without public input.
- Prosecutors and victims are not denied the opportunity to appeal because of the AG's cost to respond.
- Prisoners would not be entitled to appointed counsel.

If prisoner appeals are not restored, it is imperative that at least a requirement for detailed reporting be placed in the guidelines statute so that the board's compliance with the presumption can be independently monitored.

In sum, we would ask that you:

- Substitute the presumption of parole with limited exceptions that was originally proposed by CSG for Sec. (7) of HB 4138 (H-2).
- Make that presumption applicable to current as well as future prisoners who score high probability of release.
- Ensure that the presumption is enforced through the restoration of prisoners' right to appeal parole denials or, at a minimum, by a reporting requirement that is sufficiently detailed to permit monitoring of the parole board's compliance.